No. 93-82

Supreme Court, U.S.
FILED
SEP 9 1993
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1993

REGENTS OF THE UNIVERSITY OF CALIFORNIA, ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Petitioners,

VS.

AVERELL SMITH, ARLO HALE SMITH, ADLAI SMITH, BRAD SPARKS, JIMMY HOM, EMILY TAYLOR, ALEXA SMITH, THOMAS KISTLER,
Respondents.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

MARK HIMELSTEIN
22 Second Street, Sixth Floor
San Francisco, California 94105
Telephone: (415) 543-5805

Attorney for Petitioner
ASSOCIATED STUDENTS OF THE UNIVERSITY OF CALIFORNIA

JAMES E. HOLST
GARY MORRISON
CHRISTINE HELWICK
FRED TAKEMIYA
OFFICE OF THE GENERAL COUNSEL
UNIVERSITY OF CALIFORNIA
300 Lakeside Drive, 7th Floor
Oakland, California 94612-3565
Telephone: (510) 987-9800

STEVEN L. MAYER*
HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON, FALK & RABKIN
A Professional Corporation
Three Embarcadero Center, 7th Floor
San Francisco, California 94111
Telephone: (415) 434-1600

Attorneys for Petitioners
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.

* Counsel of Record

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

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Respondents do not deny that the issue this case presents—whether and under what circumstances a public university can use mandatory student fees to support student political expression—is important. Instead, six Respondents contend the decision below is neither final nor in conflict with *Carroll v. Blinken*, 957 F.2d 991 (2d Cir.), *cert. denied*, --U.S.--, 121 L. Ed. 224 (1992), while the remaining Respondents (Thomas Kistler and Emily Taylor) defend the decision below on the merits. None of Respondents' arguments justifies denying certiorari.

ARGUMENT

I.

THE DECISION BELOW IS FINAL.

Respondents Averell Smith, *et al.* contend that the decision of the California Supreme Court is not yet final, as it "contemplates further proceedings both in this action and beyond." Opposition to Petition for Writ of Certiorari ("Smith Br.") at 9.[1] To the contrary, the California Supreme Court's opinion finally decides all three issues presented. It contemplates no further judicial proceedings on either the issue of off-campus lobbying, as to which the Smith Respondents concede finality (Smith Br. 9), or the issue concerning funding of individual student groups (*see* Part I(A), *infra*). Therefore, certiorari may be granted on these distinct issues without regard to the finality of the third issue, which involves funding the political activities of the ASUC Senate itself. As to that issue, moreover, review may be granted because the opinion below finally determines the federal issue, and contemplates only the application of that announced (and erroneous) standard to facts found in further proceedings. *See* Part I(B), *infra*.

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[1]The other opposition filed by Respondent Arlo Hale Smith, as counsel on behalf of Respondents Kistler and Taylor, will be referred to as "Kistler Br."

A. The Opinion Below Is Final As To Funding Student Political Groups.

The California Supreme Court's holding invalidating the University's present procedures for funding student political groups is unquestionably final. As Respondents themselves admit, the court "ordered the university to establish a procedure similar to that outlined in *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986)," if it continues to use mandatory fees to fund political expression by student groups. Smith Br. 9-10. Although the court thus required the University to institute certain internal procedures, it neither ordered nor contemplated further *judicial* proceedings on this issue. Pet. App. 21a-22a. Indeed, the decision states unambiguously that "plaintiffs are entitled to relief on their claims regarding student groups and ASUC lobbying . . . ." Pet. App. 30a.[2]

The relief ordered by the decision below leaves Petitioners only two options, each of which would require immediate and major changes in the pre-litigation status quo should certiorari be denied. First, Petitioners can either not fund "overtly political groups" at all, or fund them under "a different funding mechanism." Smith Br. 10. Alternatively, Petitioners can institute the *Hudson*-type procedures imposed by the decision below. Pet. App. 22a.[3]

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[2]Under the California Supreme Court's opinion the only further *judicial* proceedings on the "student groups" issue will be the purely ministerial act of the lower court granting Respondents the relief ordered by the California Supreme Court. It has long been established that such ministerial acts do not bar finality. *See, e.g., Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 216 n.8 (1977) (judgment final where only ministerial acts remain on remand); *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942) (same). And while the decision below requires the University to provide an internal administrative remedy, a state court's order requiring a state agency to provide such relief is final. *See, e.g., Avery v. Midland County*, 390 U.S. 474, 478 n.2 (1968) (Texas Supreme Court order requiring county government to redistrict held final, as the "opinion contemplated no further proceedings in the lower Texas courts . . .").

[3]Respondents argue that the decision is not final because "not a single

(continued...)

These procedures will work a fundamental change in Petitioners' use of mandatory fees. The decision below requires the University first to determine—for *each* of the groups whose funding is at issue—whether the educational benefits provided by their activities were outweighed by or incidental to their political goals.[4] Making these determinations will require Petitioners to engage in viewpoint discrimination that is both offensive to the First Amendment (*see* Pet. 24-26; *Gay & Lesbian Students Ass'n v. Gohn*, 850 F.2d 361, 367-68 (8th Cir. 1988)), and a wholly unnecessary administrative burden. Then the University must also provide Respondents with "an adequate explanation of the basis" for its decisions, "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending." Pet. App. 22a (citation omitted).

The impact of this case, of course, is not limited to the past use of funds by the groups Respondents chose to

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[3](...continued)
student political group has been denied funding . . . ." Smith Br. 9. That argument misses the point. The issue here is the process by which funding decisions are made, not the outcome of those decisions. Moreover, the student political groups are not parties to this proceeding. As to the parties before the Court, the University and the ASUC, relief is final because they will have to change their procedures if certiorari is denied.

[4]The Smith Respondents assert that the California Supreme Court permitted the use of mandatory fees "unless the group's educational function is merely incidental to its political and ideological activities." Smith Br. 10. The opinion below, however, is quite ambiguous, also describing the test as whether "a group's dedication to achieving its political or ideological goals, at some point, *begins to outweigh* any legitimate claim it may have to be educating students . . . ." Pet. App. 12a (emphasis added). Whichever test applies, the University will have to weigh the political and ideological content of speech against its educational value—an inquiry which turns the First Amendment on its head by presuming that speech devoted to a political purpose cannot also be educational. *See* Brief of *Amicus Curiae* American Council on Education 3-7.

challenge. The decision below would require the University to implement the same intrusive procedures with respect to every student group *currently* requesting or receiving mandatory fee proceeds. Moreover, the University would have to carry out this sweeping, campus-wide review annually as groups' members, goals, and agendas change and as new groups request funding.

In addition, failure to review the decision below will place all of California's many public universities in limbo regarding the important First Amendment issues raised by this case, pending resolution of the separate and distinct issue of funding for the ASUC Senate's own political activities. That too is a reason for prompt review. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 485-86 (1975); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247 n.6 (1974) ("[w]hichever way we were to decide on the merits, it would be intolerable to leave unanswered . . . an important question . . . under the First Amendment"). In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), this Court recognized that "[a]djudicating the proper scope of First Amendment protections has often been recognized by this Court as a 'federal policy' that merits application of an exception to the general finality rule." *Id.* at 55; *see also Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) (reviewing protective order barring publication of information gained through discovery in pending litigation). The uncertainty created by the decision below in an important area of First Amendment law must be avoided, particularly where it would leave California universities struggling to apply a different standard than universities in other states.

Because both the student groups and off-campus lobbying issues are unquestionably final, this Court can and should grant certiorari as to the first and third questions presented (Pet. i) without regard to the finality of the second question. Those two "distinct issue[s] of federal law will survive and require decision no matter how further proceedings resolve the issues concerning" the use of mandatory fees to fund the ASUC's own political activities.

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 309 n.3 (1987); *Cox*, 420 U.S. at 480. In an analogous setting, *First English* granted review of a takings claim even though a parallel claim for inverse condemnation had been remanded for further proceedings. This Court should grant review however it resolves the remaining issue. Moreover, as we show in the next section, that third issue is also final and reviewable.

B. The Holding Below Is Final As To Funding The ASUC Senate's Own Political Activities.

The California Supreme Court has ordered further judicial proceedings on the issue of the ASUC's own political activities, which consist primarily of passing resolutions. Pet. App. 30a. On remand, the trial court must determine whether mandatory fees have been spent on such activities. If the court finds that fees have been so spent, it will then have to determine whether the expenditures are justified by their educational value, applying the same strict scrutiny standard applied to funding of other student groups. *Id.* Regardless of the outcome upon remand, that standard will inevitably survive, and is final for purposes of Supreme Court review.

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975), is the seminal decision on finality of state court decisions. In *Cox*, the Georgia Supreme Court upheld the constitutionality of a statute giving rise to a civil action for publication of the identity of a rape victim. It remanded, however, for further factual determinations in light of its constitutional holding. Despite those pending proceedings, this Court found the decision final and reviewable.

Just as in *Cox*, the ASUC Senate funding issue is one:

> "where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue

> by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . [in] the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." (*Id.* at 482-83)

This case meets each of these criteria. First, if on remand Petitioners establish that no mandatory fee proceeds were spent on ASUC political activities, they would prevail on nonfederal grounds.[5] In that event, this Court could not review the erroneous California Supreme Court decision applying the wrong First Amendment standard to the issue this case presents; the unreviewed decision of the California Supreme Court would be left standing (*id.* at 485-86); and the conflict with the Second Circuit would remain unresolved.

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[5]In *Cox* the party relying on the First Amendment had lost in the state courts and faced a trial on a state claim in which the First Amendment could not be raised as a defense. Here Respondents brought a First Amendment claim and will prevail on this issue if they can carry their burden on the remanded questions. That distinction is immaterial, however, because there are First Amendment interests on both sides of this case. Just as in *Cox*, Petitioners will not be able to assert their First Amendment position as a justification for any mandatory fee proceeds spent by the ASUC on "political" resolutions because the California courts will be bound under the law-of-the-case doctrine by the California Supreme Court's erroneous decision. A second, unnecessary trip through the state courts is not required "on an issue that has been authoritatively decided by the highest state court." *Pennsylvania v. Ritchie*, 480 U.S. 39, 48 n.7 (1987). "The goals of finality would be frustrated, rather than furthered, by these wasteful and time-consuming procedures." *Id.* Moreover, if Petitioners prevail on remand by showing that the ASUC Senate expenditures are justified by their educational value, the federal issue would be preserved for this Court's review only if Respondents appeal—a circumstance outside Petitioners' control.

Second, "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action . . . [in] the state proceedings still to come." *Id.* at 482-83. If Petitioners are correct in contending that the constitutional question was improperly decided below, "there should be no trial at all." *Id.* at 485.

Third, allowing the decision below to remain standing will "seriously erode federal policy." *Id.* at 483. If the ASUC and other California student governments know activities their adversaries view as "political" can cause them to lose mandatory fee proceeds, they will not engage in speech that might arguably be challenged as "political." Speech encouraged by the First Amendment will be chilled. Pet. 27 & n.21.

Reaching the merits in circumstances such as this "is consistent with the pragmatic approach" this Court has followed, especially where failing to do so would leave unanswered important First Amendment questions. 420 U.S. at 486; *see* p. 4, *supra.* The First Amendment issue concerning funding of the ASUC Senate should be reviewed by this Court to resolve the uncertainty created by the decision below in an important area of First Amendment law.

II.

THE DECISION BELOW IS ERRONEOUS AND CONFLICTS WITH *CARROLL V. BLINKEN.*

The principal holding below is that Petitioners may not use mandatory fees to fund on-campus political expression by student groups without (1) attempting to determine which groups provide educational benefits that are outweighed by or incidental to the groups' political goals and (2) affording dissenting students the remedies provided in *Chicago Teachers Union v. Hudson,* 475 U.S. 292 (1986). This basic holding is erroneous for all the reasons explained in the Petition for Certiorari. Pet. 9-26. It cannot be defended on the ground that the funding decisions are not content-

neutral, both because that argument is procedurally barred and because it is wrong. Nor can it be defended as consistent with *Carroll*.

Respondents Kistler and Taylor do not deny that if the funding of student groups creates a public forum, funding must be available to all groups without regard to the content of their speech. Instead, they say Petitioners have not created a public forum because the ASUC's funding decisions are neither content-neutral nor based on objective standards. Kistler Br. 15-23. These contentions are procedurally barred. Kistler and Taylor did not seek review in the California Supreme Court of the Court of Appeal's second opinion. They cannot support the decision below on the basis of contentions that were never properly raised in that court. *Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987); *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 435 (1940).[6] Moreover, every court that has reached the issue has determined that ASUC funding is content-neutral.[7]

The Smith Respondents argue there is no conflict both because this case is distinguishable from *Carroll* on its facts and because the court below applied the same standard adopted in *Carroll*. Neither argument is correct.

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[6]The petition for review that was filed on behalf of the Smith Respondents in the California Supreme Court did not challenge the Court of Appeal's decision on the grounds now raised by Kistler and Taylor. Accordingly, the California Supreme Court was not required to—and did not—consider these grounds for reversing the Court of Appeal's decision even though Kistler and Taylor belatedly raised them in their briefs on the merits in that court. CAL. R. CT. 28(e)(2).

[7]Pet. App. 133a; Pet. App. 115a; Pet. App. 86a. The California Supreme Court did not decide otherwise. Moreover, there is no evidence of viewpoint-discrimination in the ASUC's funding decisions. The "conservative group" (Kistler Br. 17) whose funding was denied was the "Berkeley College Young Republicans" (RT 651-52), which—as a partisan organization—could not be funded.

Respondents suggest that the university's role in approving expenditures in *Carroll* was more active because the president approved funding decisions and because those decisions were governed by regulations requiring the fees to be spent on "educational activities." Smith Br. 13. Yet they do not explain why this is a material fact and, in any event, it does not distinguish *Carroll* from this case. Applicable standards require student organizations to use funds "for purposes or programs related to the University or beneficial to the student body . . . ." Pet. App. 73a. Similarly, the student government cannot use mandatory fees "except for University-related" purposes. RT 1064; Exh. 10 ¶63.00. The University Chancellor testified that one of his responsibilities was "to assure that lots of viewpoints are represented" (RT 1045) and that he relied on the vice-chancellor to monitor grants to make sure that they complied with applicable rules (RT 1086-87).

Carroll indisputably conflicts with the decision below, notwithstanding that the plaintiffs there challenged funding for only one specific group. In deciding that NYPIRG could use mandatory fees for on-campus ideological expression, the Second Circuit recognized its decision could affect other groups (957 F.2d at 1001) and adopted a standard for on-campus use of mandatory fees that does not require any inquiry into the content of speech. Under *Carroll*, therefore, any on-campus student political group—no matter how ideological—may be funded as long as it will add its voice to the "thriving campus forum of vigorous advocacy and political action." *Id.*[8] The decision below, in contrast, presumes that political speech is not educational by forcing the University to weigh the political content of speech

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[8]Respondents base their argument on the suggestion that *Carroll* described NYPIRG's activities as educational. Smith Br. 12-13. To the contrary, *Carroll* described NYPIRG as "an ideological organization" (957 F.2d at 994), which pursued its political goals on campus by, *inter alia*, "petition[ing] against nuclear power." *Id.* at 1001. It was that very partisanship that fulfilled the University's "traditional mission in a free society." *Id.*

against its educational value. Moreover, the decision below applies strict scrutiny, while *Carroll* applies a lesser standard of review that does not incorporate a less restrictive alternative analysis. Pet. 13-14. Certiorari should be granted to resolve this fundamental split in First Amendment jurisprudence.

CONCLUSION

For the reasons expressed in this brief and the Petition, we respectfully urge the Court to grant certiorari.

DATED: September 9, 1993. Respectfully,

JAMES E. HOLST
GARY MORRISON
FRED TAKEMIYA
Office of the General Counsel
University of California

MARK HIMELSTEIN
Attorney for Petitioner Associated Students of the University of California

STEVEN L. MAYER*
HOWARD, RICE, NEMEROVSKI, CANADY, ROBERTSON, FALK & RABKIN
A Professional Corporation
Attorneys for Petitioners The Regents of the University of California, et al.

*Counsel of Record